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## State v. Greene Respondent's Brief Dckt. 44682

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44682
Plaintiff-Respondent,	)	
	)	Fremont County Case No.
v.	)	CR-2016-274
	)	
TIMOTHY RAY GREENE,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Greene failed to establish that the district court abused its discretion by declining to further reduce his sentence pursuant to his Rule 35 motion for reduction of sentence?

Greene Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Forty-seven-year-old Greene sexually assaulted his fiancée's daughter's 16-year-old friend, M.D., while both he and M.D. were under the influence of alcohol. (PSI, pp.4-7.) M.D. was at Greene's house for a New Year's Eve Party and had passed out;

when she awoke Greene came into the room, “tugg[ed] on [her] jeans,” “grop[ed] [her] breast,” penetrated her vagina with his fingers, performed oral sex on her, and ““then had sex with her from behind.”” (PSI, pp.4-7.)

The state charged Greene with rape. (R., pp.45-46.) Pursuant to a plea agreement, Greene pled guilty to an amended charge of felony injury to a child. (R., pp.108-16.) The district court imposed a unified sentence of 10 years, with six years fixed. (R., pp.141-43.) Greene filed a timely notice of appeal. (R., pp.148-50.) Greene also filed a timely Rule 35 motion for a reduction of sentence, which the district court granted by reducing Greene’s sentence to a unified sentence of 10 years, with four years fixed. (R., pp.151-52, 176-77.)

Greene asserts the district court abused its discretion by declining to further reduce his sentence pursuant to his Rule 35 motion for a reduction of sentence. (Appellant’s brief, pp.5-7.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Greene must “show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion.” Id. Greene has failed to satisfy his burden.

The only arguably “new” information Greene provided in support of his Rule 35 motion was a letter in which Greene’s fiancée opined that Greene is “not a sexual threat to society” and that the sentence he received did “not fit the crime.” (Defendant’s Exhibit A; see also 1/24/17 Tr., p.84, L.14 – p.86, L.22.) Apart from that letter, the balance of Greene’s argument in support of a reduction of sentence focused on

information of which the court was already aware, including Greene's LSI score which suggested he was a moderate risk to reoffend, his relatively minimal criminal record, the recommendations of the substance abuse evaluator and Greene's therapist that Greene receive treatment in the community, and the role that alcohol played in Greene's offense. (1/24/17 Tr., p.86, L.23 – p.89, L.22.) After considering all of that information, and reevaluating its sentence in light of the evidence before it, the district court granted Greene's motion and reduced the fixed portion of his sentence by two years. (1/24/17 Tr., p.110, L.20 – p.113, L.5; R., pp.176-77.) In doing so, the court noted the modification would give Greene "the opportunity to receive the treatment that he needs sooner, much sooner, two years sooner, than he would have received it otherwise" while still otherwise accomplishing the objectives of criminal punishment. (1/24/17 Tr., p.110, L.20 – p.111, L.20.)

On appeal, Greene does not argue that the court failed to exercise reason when considering his Rule 35 motion. Nor does he contend that the court failed to act within the boundaries of its discretion and consistently with the applicable legal standards that allow it to reduce a sentence in light of new or additional information provided after the sentence was imposed. Instead, for the first time on appeal, Greene argues that the court abused its discretion by not further reducing his sentence pursuant to his Rule 35 motion because, he contends, the court made a clearly erroneous finding *at sentencing* that Greene "suffers from no substantial mental illnesses ... and is not in need of mental health treatment." (Tr., p.63, Ls.10-12 (cited in Appellant's brief, p.6).) Greene's argument fails to show an abuse of discretion for two reasons.

First, Green never asserted to the district court as a basis for reducing his sentence that the court's finding regarding his mental health condition was erroneous. (See generally R., pp.151-52; 1/24/17 Tr.; Exhibit 1.) Having never been asked to reconsider Greene's sentence on this basis, the district court could not have abused its discretion by failing to do so.

Second, even if Greene could challenge a factual finding made at sentencing for the first time on appeal from the denial of his Rule 35 motion, a review of the record shows the court's finding is supported by substantial evidence. Under the heading, "Current Mental Health Concerns" on the first page of Greene's "§ 19-2524 DHW Mental Health Examination Report," the mental health examiner specifically checked "No" in response to the question: "GAIN assessment and/or other resources as noted above indicate that a serious mental illness (SMI) may be present?" (PSI, p.89.) The examiner did indicate that "Greene reported symptoms consistent with a diagnosis of a mood disorder and the possible existence of a stress disorder," but he did not find that Greene was suffering from any serious mental illness. (PSI, p.89; see also p.75.) That the examiner later indicated "Greene presents with SMI or MH needs as noted above in 19-2524 report" and that "mental health treatment is **recommended if released to the community**" (PSI, p.90 (emphases added)) does not contradict the examiner's conclusion, or the district court's findings, that Greene does not suffer from any serious mental illness and does not *require* mental health treatment. The examiner himself clearly did not believe that Greene's mental health issues related to his potential mood and stress disorders warranted either classification as a serious mental illness or even treatment while incarcerated. (PSI, pp.89-90.) Greene has failed to show the district

court's finding, which is consistent with the mental health examination report, is clearly erroneous.

The district court considered all of the relevant information and arguments presented to it and reasonably exercised its discretion in reducing the fixed portion of Greene's sentence by two years. That Greene would have liked the district court to further reduce his sentence based on Greene's *post hoc* assertion that the court did not adequately consider the impact of his mental health issues on its sentencing decisions does not establish an abuse of discretion.

#### Conclusion

The state respectfully requests this Court to affirm the district court's order granting, in part, Greene's Rule 35 motion for a reduction of sentence.

DATED this 27th day of July, 2017.

/s/ Lori A. Fleming  
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Deputy Attorney General

ALICIA HYMAS  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of July, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BRIAN R. DICKSON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ Lori A. Fleming  
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